General Holdings Sdn Bhd v Multi-Purpose Holdings Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO 22–564 OF 1991
MOHD SAARI J
3 NOVEMBER 2000

Trusts and Trustees *— Charitable trust — Incompletely constituted trust — Variation of — Supplementary agreement created trust for benefit of third party — Parties to agreement fail to carry out terms of agreement — Whether terms of agrement could be varied — Whether agreement binding on parties*

The plaintiff owned shares in two companies, namely Dominion Holdings Sdn Bhd and General Industries Sdn Bhd. On 27 November 1980, the plaintiff entered into a contract with the defendant whereby the plaintiff agreed to sell and the defendant agreed to buy all the issued capital in the two companies for RM206,252,345. The defendant paid the plaintiff the amount payable save and except RM10m. By a supplementary agreement dated 27 November 1980, the plaintiff agreed to set up a charitable foundation called the 'Chang Ming Thien Foundation' ('the Foundation') which was incorporated under the Companies Act 1965 on 18 April 1990, as a company limited by guarantee. The defendant was also authorized to and did deduct RM10m from the balance of the purchase price payable to the plaintiff. However, the sum of RM10m was still being retained by the defendant and only the income of the aforesaid sum was transferred to the Foundation's account. The issue was whether the plaintiff was entitled through prayer (d), to vary or amend the terms of the supplementary agreement.

Held:

(1) After the execution of the supplementary agreement on 27 November 1980, followed by the setting up of the Foundation on 18 April 1990, the plaintiff did nothing to cause RM10m to be deposited with the Foundation. By such omission, it could not be said that the plaintiff had done everything pursuant to the supplementary agreement. That being the case, the court held that the supplementary agreement was not binding on the plaintiff (see p 471F–G); *Milroy v Lord* (1862) 4 De GF & J 264; 31 LJ Ch 798 followed.

(2) Consequently, there was nothing to prevent the plaintiff from varying or amending the terms of the supplementary agreement, as in prayer (d) of the statement of claim. In the case of the defendant being a volunteer, the defendant had no right whatsoever to enforce the supplementary agreement (see p 471G–H).

[**Bahasa Malaysia summary**

Plaintif memiliki saham-saham di dalam dua buah syarikat, dikenali

sebagai Dominion Holdings Sdn Bhd dan General Industries Sdn Bhd. Pada 27 November 1980, plaintif telah memasuki satu kontrak dengan defendan di mana plaintif telah bersetuju untuk menjual dan defendan bersetuju untuk membeli semua modal di dalam dua syarikat tersebut sebanyak RM206,252,345. Defendan telah membayar plaintif jumlah yang perlu dibayar kecuali RM10j. Melalui satu perjanjian tambahan bertarikh 27 November 1980, plaintif bersetuju untuk menubuhkan satu penubuhan amal dikenali sebagai 'Pertubuhan Chang Ming Thien' ('Pertubuhan tersebut') yang telah ditubuhkan di bawah Akta Syarikat 1965 pada 18 April 1980, sebagai sebuah syarikat terhad oleh jaminan. Defendan telah diberi kuasa untuk dan telah memotong RM10j daripada baki harga jualan yang perlu dibayar kepada plaintif. Bagaimanapun, jumlah RM10j masih disimpan oleh defendan dan hanya pendapatan daripada jumlah tersebut telah dipindahkan kepada akaun Pertubuhan tersebut. Isu adalah sama ada plaintif berhak melalui permohonan (d), mengubah atau meminda terma-terma perjanjian tambahan tersebut.

Diputuskan:

(1) Setelah perjanjian tambahan disempurnakan pada 27 November 1980, diikuti oleh penubuhan Pertubuhan tersebut pada 18 April 1990, plaintif tidak membuat apa-apa untuk menyebabkan RM10j tersebut disimpankan ke dalam Pertubuhan tersebut. Melalui peninggalan tersebut, tidak boleh dikatakan bahawa plaintif telah buat apa yang sepatutnya berikutan perjanjian tambahan tersebut. Oleh demikian, mahkamah memutuskan bahawa perjanjian tambahan tersebut tidak mengikat plaintif (lihat ms 471F–G).

(2) Akibatnya, tidak terdapat apa-apa yang menghalang plaintif daripada mengubah atau meminda terma-terma perjanjian tambahan tersebut, sebagaimana di dalam permohonan (d) pernyataan tuntutan. Di dalam kes defendan sebagai seorang sukarelawan, defendan tidak mempunyai apa-apa hak untuk menguatkuasakan perjanjian tembahan tersebut (lihat ms 471G–H).]

Notes

For cases on charitable trusts generally, see 12 Malla's Digest (4th Ed, 2000 Reissue) paras 1732–1750

Cases referred to

Brunker v Perpetual Trustee Company (Ltd) [1937] 57 CLR 555 (refd)
Lee Eng Teh & Ors v Teh Thiang Seong & Ors [1967] 1 MLJ 42 (folld)
Milroy v Lord (1862) 4 De GF & J 264; 31 LJ Ch 798 (folld)

Legislation referred to

Companies Act 1965
Real Property Act 1900 [NSW]

LH Chua (*LH Chua*) for the plaintiff.

Robert Lazar (*Felix Raj* with him) (*Shearn Delamore & Co*) for the defendant.

Mohd Saari Yusoff J. : In the writ and statement of claim, the plaintiff prays for the following:

a) Deklarasi bahawa defendan memegang jumlah wang RM10j dan segala faedah yang terakru darinya dengan cara amanah bagi dan sebagai pemegang amanah untuk manfaat (benefit) plaintif secara mutlak;

b) Deklarasi bahawa jumlah tersebut sebagai hadiah gagal kerana ketaksaan dan kurang kepastian dalam tujuan;

c) Deklarasi bahawa jika jumlah itu adalah hadiah bagi khairat ianya gagal kerana ketakpastian;

d) Secara altematif, deklarasi bahawa plaintif adalah berhak mempunyai pengawalan dan pengurusan Dana Amanah sebanyak RM10j bagi dan untuk tujuan khairat atau apa-apa pertubuhan khairat seperti yang akan diluluskan oleh pihak berkuasa yang relevan;

e) Kos

Factual background

At all material times, the plaintiff owned shares in two companies, namely Dominion Holdings Sdn Bhd and General Industries Sdn Bhd. By a written agreement dated 27 November 1980 entered into between the plaintiff and the defendant, the plaintiff agreed to sell and the defendant agreed to buy all the issued capital in the two companies for a total purchase price of RM206,252,345. It is common ground that the defendant had paid to the plaintiff the amounts payable under the agreement, save and except RM10m.

Under a supplementary agreement, under the heading 'undertaking' dated 27 November 1980, the plaintiff, through its representative, Mr Chang Ming Thien, agreed to set up a charitable foundation to be called 'Chang Ming Thien Foundation' on terms as set out therein. For ease of reference, the supplementary agreement is reproduced below:

UNDERTAKING

This undertaking is made on the 27th day of November 1980 between GENERAL HOLDINGS SDN BHD (hereinafter referred to as 'General') of the one part and MULTI-PURPOSE HOLDINGS SDN BHD (hereinafter called 'Multi-Purpose') of the other part, and is supplemental to an agreement of even date herewith and made between the same parties.

Mr CHANG MING THIEN hereby undertakes that in consideration of the said agreement, he will set up a ten (10) million Malaysian Ringgit charitable foundation to be called 'Chang Ming Thien Foundation', the management and control of which shall be decided by the nominees of Multi-Purpose.

Pursuant to the aforesaid supplementary agreement, Chang Ming Thien Foundation ('the Foundation') was incorporated under the Companies Act 1965 on 18 April 1990 as a company limited by guarantee.

Further, it is common ground that the defendant was authorized and the defendant did deduct RM10m from the balance of purchase price payable to the plaintiff. But the sum of RM10m is still being retained by the defendant. Only the income from the aforesaid sum was transferred to the account of the Foundation.

It is observed that the relief sought by the plaintiff under prayer (d) has the effect of varying or amending the terms of the aforesaid supplementary agreement.

Issue

The central issue for determination is whether the plaintiff is entitled to vary or amend the terms of the aforesaid supplementary agreement.

On the law

In the case of incompletely constituted trust, it resembles an imperfect gift. On the legal effect of an imperfect gift, the case of *Brunker v Perpetual Trustee Company (Limited)* [1937] 57 CLR 555 provides a good illustration. In that case, a bachelor 71 years of age died from cardiac failure after an illness of seven days' duration. On the day before his death he executed a memorandum of transfer in respect of certain land under the Real Property Act 1900 (NSW) in favour of the appellant, who for many years had been his housekeeper and had attended to him during his last and previous illness.

In the same case Mc Tiernam J at p 609 said:

> The legal estate in the land could not pass to the appellant except by registration of the transfer, and, as she was a volunteer only, no equitable rights passed to her by the transfer, which did not purport to be a declaration of trust. It is plain that if the registered proprietor of land, intending to make a gift, executes a memorandum of transfer in favour of a volunteer and retains possession of the instrument, the volunteer has no equity to compel the registered proprietor to have it registered or to obtain possession of the instrument in order to have it lodged for registration.

On the legal effect of an incompletely constituted trust, Gill J (as he then was) in *Lee Eng Teh & Ors v Teh Thiang Seong & Ors* [1967] 1 MLJ 42 at p 44 said:

> The next question to be considered is whether the promise made by the first defendant constituted a trust which is enforceable. Whether a trust is enforceable or not depends upon whether it is a completely or an incompletely constituted trust. A trust is said to be completely constituted when the trust property has been vested in trustees for the benefit of the beneficiaries: until that has been done the trust is incompletely constituted. The distinction between completely and incompletely constituted trusts is of importance principally with regard to the question of consideration. In other words, the

question to be considered is whether valuable consideration was given for the creation of the trust. If valuable consideration is given in exchange for the creation of the trust, it does not matter whether the trust is completely constituted or not, for equity regards as done that which ought to be done and will perfect an imperfect conveyance for value by treating it as a contract to convey. But there is no equity to perfect an imperfect voluntary trust. As was said by Lord Eldon in *Ellison v Ellison (1802), 6 Ves 656, 662; 6 RR 19*:

> 'I take the distinction to be, that if you want the assistance of the court to constitute a cestui que trust, and the instrument is voluntary, you shall not have that assistance, for the purpose of constituting a cestui que trust, as upon a covenant to transfer stock, it rests in covenant, and is purely voluntary, this court will not execute that voluntary covenant, but if the party has completely transferred stock, though it is voluntary, yet the legal conveyance being effectually made, the equitable interest will be enforced by this court.'

The general principle applicable has been enunciated by Turner LJ in *Milroy v Lord* (1862), 4 De GF & J 264; 31 LJ Ch 798, as follows:

> ln order to render a voluntary settlement valid and effectual, the settler must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him. He may, of course, do this by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual; and will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those purposes …But, in order to render the settlement binding, one or other of these modes must (as I understood the law of this court) be resorted to, for there is no equity in this court to perfect an imperfect gift.

Finding

Are the terms of the supplementary agreement binding on the plaintiff? After the execution of the supplementary agreement on 27 November 1980 followed by the setting up of the Foundation on 18 April 1990, it is observed that the plaintiff did nothing to cause RM10m to be deposited with the Foundation. On the principle as enunciated in *Milroy v Lord* which is followed in *Lee Eng Teh & Ors v Teh Thiang Seong & Ors*, by such omission, it could not be said that the plaintiff had done everything pursuant to the supplementary agreement. That being the case, I hold that the supplementary agreement is not binding on the plaintiff. Consequently, there is nothing to prevent the plaintiff from varying or amending the terms of the supplementary agreement, as in prayer (d) of the statement of claim. In the case of the defendant being a volunteer, the defendant had no right whatsoever to enforce the supplementary agreement.

In the premise and for reasons as adumbrated above, I order in terms as in alternative prayer (d) of the statement of claim. Costs to the plaintiff.

Order accordingly.

Reported by Chew Phye Ken